IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.1684 OF 2006

1. Dr.Anil Nandkishor Tibrewala,)
2. Mrs.Nasreena Anil Nandkishor,)
Tibrewala, both adults, Indian)
Inhabitants, residing at Flat)
No.B-62, Empire Estate, Kemps)
Corner, Mumbai-400 036 and)
owners of the Flat No.902,)
situate at 9th Floor, Building)
No.6, Patel Tower, B.G.Kher)
Road, Worli, Mumbai-400 018.).Petitioners.

Versus

1. Jammu and Kashmir Bank Ltd.,)
a Banking Company incorporated)
under the Jammu and Kashmir)
Companies Act, 1977 (Svt.Era))
having its Registered office)
at Corporate Head Quarters,)
Maulana Azad Road, Srinagar)
and one of its Branch Office)
among others at Fort, Mumbai,)
Homi Modi Cross Lane-II,)
Fort Chambers, Block-B,)
Mumbai-400023.)

2. Messers.Meridian Exports and)
Industries a Partership firm)
duly registered under the)
provisions of the Indian)
Partnership Act, having office)
at Holland House, 14, Colaba)
Causeway, Mumbai- 400 039.)

3. Hareshkumar Pravinchandra)
Sanghvi.)

4. Mrs.Bhavana Tushar Sanghvi)

5. Mrs.Malini Pradeep Shroff)

(The Respondent Nos.3 to 5)

are of Mumbai, adults, Indian Inhabitants carrying on business in partnership in the name and style of M/s.Meridian Exports and Industries, having their place of business at Holland House, 14, Colaba Causeway, Mumbai-400 039.)

6. M/s.Principal Impex Pvt. Ltd., a private limited company duly registered and incorporated under the provisions of Companies Act, 1956 having its Registered office at Holland House, Behind Diana Eclipse, 14, Colaba, Causeway, Mumbai-400 039.)

7. M/s.Umang Builders Pvt.Ltd., a Private Limited company duly registered and incorporated under the provisions of Companies Act, 1956 having its Registereed office at Holland House, behind Diana Eclipse, 14, Colaba Causeway, Mumbai-400 039.)

8. Maharashtra Unique Automobiles Pvt. Ltd., a Private Limited Company duly registered and incorporated under the provisions of Companies Act, 1956 having its Registered office at Holland House, Behind Diana Eclipse, 14, Colaba, Causeway, Mumbai-400 039.)

9. Tushar Pravinchandra Sanghvi, of Mumbai, Indian Inhabitant, carrying on business at Holland House, Behind Diana Eclipse, 14, Colaba Causeway, Mumbai 400 039.)

10. Mrs.Panna Hareshkumar Sanghvi, of Mumbai, Indian Inhabitant,)

carrying on business at Holland)
House, Behind Diana Eclipse,)
14, Colaba Causeway, Mumbai)
400 039.)

11. Recovery Officer,)
Debts Recovery Tribunal-I,)
Mumbai.).Respondents.

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Mr.Iqbal Chagla, Senior Counsel with Mr.F.Devitre, Senior Counsel and Mr.J.P.Sen i/b. Federal & Rashmikant, Advocates for the Petitioners.
Mr.S.Satpute i/b. Satpute & Co. for Respondent No.1.
Mr.S.K.Jain, Advocate for Respondent Nos.2 & 5.

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CORAM : **F.I.REBELLO AND SMT.V.K.TAHILRAMANI,JJ.**

DATED : **JULY 11, 2006.**

JUDGMENT (PER F.I.REBELLO, J.) :

1. Rule. Other Respondents, though served, have not put in appearance. Heard forthwith.

2. The petitioners had moved the Debt Recovery Tribunal under the provisions of Section 19(25) of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (hereinafter referred to as the RDB Act). The application which was filed on 1.12.2005 was numbered as Misc.Application No.52 of 2005 for rectification/modification/correction

of the order dated 15.9.2005. It is the case of the petitioners, that the matter was posted for orders on 7th December, 2005, however, the Presiding Officer ceased to hold the office and no order was passed on the same.

3. We may now refer to a few facts :

. Respondent No.1 had taken out proceedings before the Debts Recovery Tribunal being O.A.No.305 of 2002 by application dated 18.9.2002. Respondent Nos.2 to 10 herein were the Respondents before the Tribunal. By order dated 15.9.2004 the D.R.T. was pleased to allow the application which included a prayer that Flat No.902 was validly mortgaged in favour of Respondent No.1 i.e. the Jammu & Kashmir Bank Ltd., and if there was failure to pay the amount to Respondent No.1, the Respondent No.1 was entitled to sell the Flat. Pursuant to the said order, the Recovery Officer issued recovery certificate dated 29.10.2004. On 30.5.2006, the Respondent No.1 moved an application for enforcement of recovery certificate for attachment of Flat No.902 and,

according to the petitioners, without any notice to them. By order of 30th May, 2005, the learned Recovery Officer was pleased to allow the said application. The petitioners' application being Misc.Application No.52 of 2005 came up for hearing on 14.6.2006. Oral application was made by petitioners' Advocate for stay of allotment of Flat No.902. That application was neither considered nor granted, according to the Petitioners. The matter was then adjourned to 29.6.2006. It is consequent to this that the present Petition has been filed on 26.6.2006. The Petitioners thereafter have also preferred an Appeal (L) No.203 of 2006 before the D.R.T. challenging the order dated 30th May, 2006 passed by the Recovery Officer.

4. On behalf of the Petitioners, their learned Counsel submits that there is specific documentary evidence on record being the share certificates issued by the society, the receipts issued by the society and the electric bills of the Flat, which would show that the petitioners had legal title to Flat No.902. It is also pointed out that there

are documents also before the Tribunal which would show that Flat No.902 belongs to the Petitioners. It is, therefore, set out that there is documentary evidence on record which would indicate that Flat No.902 was of the ownership of the Petitioners. It is also pointed out that earlier an agreement was entered into between Yusuf A. Patel (Builder) and the Petitioners on 29.4.1987 in respect of Flat No.1102, 11th Floor, Tower No.6, Patel Apartments. By agreement dated 22.6.1987, the Flat No.1102 of 11th floor was substituted by Flat No.902 on 9th floor. All other terms remain the same. It appears that on 23.2.1988 the builder had entered into an agreement with Maharashtra Auto regarding Flat No.902. On 18.11.1992 rectification was done. The builder on April 1993, handed over the possession of Flat No.902 to the Petitioners. Letters dated 15.4.1993 and 17.4.1993 are the possession letters from the builder to the petitioners in respect of Flat No.902. On 16.4.1993 Meridian (Sanghvi family company) returned original possession letter of Flat No.901 and Flat No.902 and confirmed that Flats on 10th

Floor had been given in exchange with possession letters in that respect. The builder was requested to amend the original agreements of Flat Nos.901 and 902 to reflect the same. It appears that on 24.2.1994 the Maharashtra Auto deposited the original agreement for Flat No.902 with the Respondent No.1. By letter dated 6.5.1994, the builder informed the Maharashtra Auto that Flat No.1002 was handed over to Maharashtra Auto instead of Flat No.902. On 20.5.1994, Maharashtra Auto, sent a letter to the builder confirming the possession of Flat No.1002 instead of Flat No.902. On 25.1.1999 a deed of confirmation was entered into by the Petitioners thereby registering the agreements dated 29.4.1987 and 22.6.1987 after paying the requisite stamp duty thereon. The society was registered on 21.4.1999.

5. On behalf of the Petitioners, their learned Counsel further submits that the only remedy that is available with the petitioners considering that D.R.T. has granted declaration that there is valid mortgage, would be under Section 19(25) of the RDB Act, in the absence of any other specific

provision. It is pointed out that provisions of Sections 20 & 30 of RDB Act, would be no effective remedy nor Rule 5A of the Debts Recovery Tribunal (Procedure) Rules, 1993. It is also pointed out that the provisions of Section 29 of the RDB Act which make applicable the provisions of Second and Third Schedules of the Income Tax Act, 1961 on the facts of this case also would not be available.

. On the other hand, on behalf of the Respondents their learned Counsel submits, that they have document of mortgage in their favour and in these circumstances this Court ought not to entertain the Petition as filed by the Petitioners, but, dismiss the same.

6. In the instant case, the Petitioners have filed Misc.Application No.52 of 2005 for rectification/modification/correction of the order dated 15.9.2004 under Section 19(25) of the RDB Act. That application is still pending. In the meantime, pursuant to application made by the Respondent Bank, an order has been passed on 30th May, 2006 attaching Flat No.902. The Petitioners

have now also preferred an Appeal on 30.6.2006 against the said order of attachment.

7. By the present Petition, the relief sought for by the Petitioners is for a direction against the Respondent Nos.1 to 11, that they cannot proceed further in regard to petitioners Flat No.902 and to set aside, the order dated 30.5.2006 insofar as it pertains to Flat No.902. Ordinarily as the Petitioners have preferred an Appeal and if that was an effective remedy against the order of 30th May, 2006, we would not interfere in the exercise of our extra ordinary jurisdiction. The petition however raises an issue of vital importance under the provisions of RDB Act and the question which requires determination can be formulated as under :

> What is the remedy available to a party, who is not a party in proceedings before the Debts Recovery Tribunal, but, whose property has been declared by the Tribunal to be validly mortgaged in favour of a financial institution ?

8. Under Section 34 of the RDB Act, the provisions of the Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act. Under Section 18 no court or other authority shall have, or be entitled to exercise, any jurisdiction, powers or authority (except the Supreme Court, and a High Court exercising jurisdiction under Articles 226 and 227 of the Constitution) in relation to the matters specified in section 17.

. Against the order of the Tribunal an Appeal lies to Appellate Tribunal. In other words, the Act has conferred a specific jurisdiction on the Tribunal in respect of the class of matters which can be dealt with by the Tribunal under Section 17. An Appeal is provided and the jurisdiction of other Courts is taken away. In other words, the orders passed under RDB Act becomes final and cannot be questioned in any Court of law other than by way of Petition before this Court or any

available remedy before the Apex Court in appropriate cases. As the petitioners are not parties to the proceedings and as it is their case, that the property belongs to them what is the Forum available to such parties.

9. We may first gainfully refer to the provisions of the Code of Civil Procedure i.e. Order XXI Rule 58. Rule 58 specifically provides that if any claim is preferred to, or any objection is made to the attachment of, any property attached in execution of a decree on the ground that such property is not liable to such attachment, the Court shall proceed to adjudicate upon the claim or objection in accordance with the provisions as contained therein. Under Sub-Rule (2) of Rule 58 - all questions (including questions relating to right, title or interest in the property attached) arising between the parties to a proceedings or their representatives under this rule and relevant to the adjudication of the claim or objection, shall be determined by the Court dealing with the claim or objection and not by a separate suit. The proviso to Order 21 Rule

58(1) provides for a situation where the Court may not entertain the objection. By virtue of Sub-Rule (5) if on account of the proviso the Court refuses to entertain the objection, the party against whom such order is made may institute Suit to establish his right. By virtue of Section 47 of Code of Civil Procedure all questions arising between the parties to the suit, in which the decree was passed or their representatives and relating to execution, discharge or satisfaction of the decree shall be determined by the Court executing the decree and not by separate suit. The expression used under Section 47 therefore "parties to the Suit". The section would not apply to a case where an aggrieved person was not a party to the Suit. On the other hand Order 21 Rule 58 contemplates a case where a claim is preferred or an objection made to attachment on the ground that such property is not liable to such attachment. It is that Court which can decide the claim or objection. A reading of this would indicate that it can also be by a person other than the party to the Suit. In the matter of dispossession of

property, there is provision in Order 21 Rule 99 for an aggrieved person to raise his objection. Under Order 21 Rule 101 all questions as to right, title or interest in the property can be considered while hearing such objection. In other words, under the Code of Civil Procedure, there is specific remedy provided to a party aggrieved by the order of attachment or dispossession.

. Section 22(1) of the RDB Act specifically sets out that, the Tribunal and the Appellate Tribunal shall not be bound by the procedure laid down by the Code of Civil Procedure, 1908 (5 of 1908), but shall be guided by the principles of natural justice and, subject to the other provisions of this Act and rules. By virtue of Sub-Section (2) certain powers of the Code of Civil Procedure have been conferred on the Tribunal. Under Section 22(2)(e) that power includes the power of review. Rules have been framed which are known as the Debt Recovery Tribunal (Procedure) Rules, 1993. Rule 5A(1) reads as under :

> "**5A.Review -**
>
> (1) Any party considering itself aggrieved by an order made by the Tribunal on account of some mistake of error apparent on the fact of the record desires to obtain a review of the order made against him, may apply for a review of the order to the Tribunal which had made the order."

. A reading, therefore, of Section 22(2)(e) and Rule 5A(1) would result in holding that the Tribunal or Appellate Tribunal has been conferred the power of review. Rule 5A(1) however uses the expression "any party". The expression used in Order 47 Rule 1 of the Code of Civil Procedure is "any person". The language in the two statutes, therefore, is different and distinct. Insofar as the Code of Civil Procedure is concerned, the language is wider, in that, any person aggrieved can prefer a Review whereas insofar as Rule 5A(1) is concerned there it is limited to parties to the proceedings. The power of review therefore conferred on the Debts Recovery Tribunal cannot be exercised by a party other than a party to the proceedings.

10. The next provision which we may gainfully refer to is Section 20 of the RDB Act. Section 20

uses the expression "any person aggrieved by an order made, or deemed to have been made, by a Tribunal". In other words, the expression is wider and not limited only to a party to the proceedings. A person other than the party to the proceedings, if the language in Section 20 is considered, would be entitled to prefer an Appeal. It could, therefore, be said that in the case where the property of another is declared as being mortgaged in favour of parties to the proceedings that other person can also prefer an Appeal. In other words, persons like the petitioners who claims right in the property in respect of which financial institution have sought a declaration, could have preferred an Appeal. The only question is whether an Appeal under Section 20 is a effective remedy to an aggrieved person. For that purpose, we may gainfully refer to some observations made by a Full Bench of Calcutta High Court in the case of **Smt.Bimla Devi Vs. Aghore Chandra Mallick and Ors.** reported in **AIR 1975 CALCUTTA 80.** We may quote paragraph 15 which reads as under :-

> "15. The relevance of the observations of Mukerji, J. quoted above to the instant reference is apparent. When an application under Order 21, Rule 90 has been dismissed for default and an appeal is preferred from the order of dismissal the Appellate Court would have to go by the record as it stands and to determine upon the materials that are on record whether the appellant was prevented by sufficient cause from appearing before the trial Court. It is obvious that the Appellate Court would have no material on record to render a decision on the sufficiency of the cause and can give no relief to the appellant."

. Proceeding further, the Full Bench approved the observations in another judgment cited and stated the law as thus : " While it is true that in form a remedy was available against the order dismissing the application under Order 21, Rule 90 inasmuch as Order 43, Rule 1(j) provides for an appeal against such an order, the existence of the remedy, in circumstances, as in this case, where no evidence at all was adduced, would be more imaginary than real."

. If we examine, therefore, the remedy if available to the person like the petitioners, under Section 20, the question would be whether this is an effective remedy or is it elusive. In the Appeal preferred, the Tribunal would be bound

to consider the record as it stands. The question of invoking the provisions of Order 41, Rule 27 assuming it is applicable would not be attracted as is only meant in a case of producing additional evidence. We are dealing with a case where a party had no opportunity even to plead his case. The question therefore of leading evidence in the absence of any pleading would be futile. Section 20 though a remedy available would not be an effective remedy at law.

11. The other remedy which is available in respect of an order passed by recovery officer, is Section 30 of the Act. By virtue of Section 30 notwithstanding anything contained in Section 29, any person aggrieved by an order of the Recovery Officer made under the Act has to challenge that order within thirty days. Section 26(1) of the Act will also have to be considered, which reads as under :

> "26(1). It shall not be open to the defendant to dispute before the Recovery Officer the correctness of the amount specified in the certificate, and no objection to the certificate on any other ground shall also be entertained by the

Recovery Officer."

. In other words, it is not open to the Recovery Officer to go beyond the certificate. The grant of declaration in favour of a financial institution, cannot be gone into by the Recovery Officer. The Recovery Officer having no power to go in that issue, the question of Section 30 being an effective remedy would again be elusive. In our opinion, therefore, the remedy under Section 30 in a case where the Tribunal has given a declaration would again be elusive and non-effective, as the Recovery Officer cannot go behind the order or certificate issued by the Tribunal and/or Recovery Officer.

12. We may now refer to the provisions of Section 29 of the RDB Act. Section 29 makes applicable the provisions of Second and Third Schedules of the Income Tax Act and the Income Tax (Certificate Proceedings) Rules, 1962 applicable for execution of the recovery certificate under the RDB Act. Under the Second Schedule, proviso, recovery of tax in the instant case for the recovery of amount under the order/certificate

various modes of recovery have set out under Rule 4. Under Order 38, Rule 11 of the Code of Civil Procedure, if a claim is preferred or objection is preferred for attachment or sale in execution of the certificate on the ground that such property is not liable for such attachment or sale, it is open to the Investigating Officer to examine the same. Here also, the same difficulty would arise inasmuch as what the investigating officer can do is to hear the challenge to the attachment. It will not be open to the investigating officer to go behind the order or certificate. If the order and/or the certificate has given a declaration that the property is validly mortgaged in favour of financial institution, such an exercise cannot be undertaken by the investigating officer. It is only in the event, if there been order/certificate for money and pursuant to that certificate, property of the judgment debtor is sought to be recovered in terms of Rule 4 or recovery by attachment or sale of immovable property then only Rule 11 apply. That Rule will not apply in a case where the property was mortgaged and where the declaration was given in favour of the financial

institution. The remedy, therefore, under Section 29 also is not available to a party like the petitioners. Our attention is invited to the judgment of a learned Judge of Karnataka High Court in the case of **M/s. Actia Technologies Pvt. Ltd., & Anr. Vs. Canara Bank and Anr.** reported in **2006(2) Bank CLR 169(Kant)**. In that case the property was put for sale by the Recovery Officer. The contention of the petitioners was that the property never belonged to the judgment debtor nor was mortgaged with the Bank as a security of payment of loan count. The Court after observing the various provisions of the Act, came to the conclusion that a Writ Petition could not be entertained, as a alternate remedy was available to the petitioners before it. In that case on the facts we may note that there appears to have been no declaration given by the Tribunal that the property was validly mortgaged.

13. Does the act provide any remedy to a person like the petitioners. The Court while considering the legislation which has created a special mechanism for recovery of dues of financial

institution and bearing in mind the various provisions earlier referred which exclude the jurisdiction of other Courts and Tribunals will have to examine, whether an effective remedy is available under the Act itself. If a remedy is not available under the Act, a party may have a remedy at civil law. If an aggrieved person was not party to the proceedings before the Debts Recovery Tribunal, and a party to the proceedings has secured a decree, based on a fraudulent document, the jurisdiction of the Civil Court in such a case normally should not be ousted. For examining whether there is a provision under the Act, let us consider Section 19(25) of the RDB Act, which reads as under :

> "19(25). The Tribunal may make such orders and give such directions as may be necessary or expedient to give effect to its orders or to prevent abuse of its process or to secure the ends of justice."

. A reading of this provision would indicate that there is a power in the Tribunal to give orders or directions to prevent abuse of its process or to secure the ends of justice. It is open to the Tribunal to lay down its own procedure

and it is not hide bound by the procedural provisions of Code of Civil Procedure. At the same time certain provisions of the Code of Civil Procedure have been conferred on the Tribunal. The expression "prevent abuse of its process" "or to secure the ends of justice" in our opinion would be wide enough to cover a case where a financial institution has obtained an order or the certificate pursuant to a mortgage created by the judgment debtor based on a fraudulent document, like for instance the property not belonging to the judgment debtor. If such party comes before the Court and points out to the Court that the mortgage created is sham and/or bogus, the Tribunal to prevent abuse of its process, can assume jurisdiction under Section 19(25) to decide that issue and for that purpose exercise powers conferred under Section 22 of the Act. On a aggrieved person being allowed to participate in the proceedings, it will be open to the Tribunal to review the order or pass such other order to secure the ends of justice. We are, therefore, of the clear view that in those cases where the Recovery Officer cannot go beyond the certificate,

a party like the petitioners who claims title in the property or interest in the property can move the Tribunal by invoking jurisdiction of the Tribunal under Section 19(25), and in such cases if a prima facie case is disclosed before the Tribunal, the Tribunal is bound to consider the application so moved and dispose it according to law, after giving an opportunity to all parties before it.

14. In the light of the above discussion and conclusion, the application made by the petitioners and numbered as Misc.Application No.52 of 2005 is clearly maintainable. The Tribunal will have to proceed to dispose of the said application according to law after giving an opportunity to the parties before it. Having said so, this Petition can be disposed of by issuing the following directions :

i. The Tribunal is directed to dispose of the Misc.Application No.52 of 2005. In the meantime, Respondent No.1 is restrained from taking further steps based on the order of 30th May, 2006 pending hearing and final disposal of the Misc.Application No.52 of 2005.

ii. Consequent on the above directions

and though the attachment will continue, yet by way of abundant caution, petitioners, their servants and/or agents and/or persons claiming through them are restrained from parting with or creating any third party rights in respect of the subject Flat No.902, pending the hearing and final disposal of the application.

iii. If the order passed on Misc.Application No.52 of 2005 be adverse to the petitioners, the said order not to be acted upon for a further period of four weeks of passing of the order.

. Rule made absolute accordingly. However, there shall be no order as to costs.

[F.I.REBELLO,J.]

[SMT.V.K.TAHILRAMANI,J.]